

BEFORE THE  
POSTAL RATE COMMISSION  
WASHINGTON, D.C. 20268-0001

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POSTAL RATE COMMISSION  
OFFICE OF THE SECRETARY

COMPLAINT ON POST E.C.S.

Docket No. C99-1

**OBJECTION OF THE UNITED STATES POSTAL SERVICE TO  
UNITED PARCEL SERVICE INTERROGATORIES UPS/USPS-I -24  
(May 25, 1999)**

In accordance with Rules 25 and 26 of the Commission's Rules of Practice and Procedure, the Postal Service hereby objects to interrogatories UPS/USPS-1-24, filed on May 14, 1999. A general objection to all of the interrogatories is presented first, followed by specific objections.

**I. INTRODUCTION**

On November 5, 1998, the Postal Service moved to dismiss the Complaint in this docket. The Postal Service maintained that the Commission lacks jurisdiction to entertain the question of whether Post E.C.S. is a "postal" service. Second, even if the Commission has jurisdiction to consider the complaint, Post E.C.S. is plainly not a postal service according to the definitions of that term put forth by the courts, the Commission, and the Governors of the Postal Service.<sup>1</sup> On May 3, the Commission issued Order No. 1239 denying the Motion of United States Postal Service to Dismiss. The Order concludes that the Postal Reorganization Act authorizes the Commission to consider UPS's Complaint based upon its authority to interpret statutes establishing its authority over mail classification. The Commission concluded that further proceedings

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<sup>1</sup> Since the Postal Service's **Motion to Dismiss** was filed, the U.S. General Accounting Office issued a report classifying the Postal Service's new electronic initiatives as "nonpostal" services. See **GENERAL ACCOUNTING OFFICE, US POSTAL SERVICE DEVELOPMENT AND INVENTORY OF NEW PRODUCTS**, GAO/GGD-99-15 (November 1998) at 1 n.2.

are necessary to evaluate whether Post E.C.S. is, or is not, postal in character and the extent to which Post E.C.S. transactions are subject to the Commission's mail classification and ratemaking authority. The Order stated that a procedural schedule and special rules of practice, if any, would be issued later. The Order further directed that UPS file a statement within ten days of the Order specifying the amount of time it will need to present a case-in-chief. In response, on May 13, UPS advised the Commission that it intends to file its case-in-chief by the end of July. On May 14, UPS filed discovery upon the Postal Service. As of the time of the preparation of this document, no further action has been taken by the Presiding Officer on special rules or a procedural schedule.

## II. PRELIMINARY STATEMENT

The instant document presents a series of general and specific objections to UPS's discovery request. By filing these objections, the Postal Service does not intend its actions to manifest agreement with the Commission's conclusion in Order No. 1230 that its § 3662 complaint jurisdiction extends to the subject matter of the Complaint, i.e., whether Post E.C.S. is a postal service subject to the procedures of chapter 36 of Title 39. The Postal Service, moreover, does not intend to waive its right to contest the Commission's jurisdiction to entertain the subject matter of the Complaint in this or any other proceeding.

## III. GENERAL OBJECTION

The Postal Service submits that UPS's discovery request is premature. As is evident from the Presiding Officer's observations in a proceeding that addressed a

similar legal issue, Docket No. C96-1, the scope of discovery in a complaint proceeding is far from clear:

Proceedings to consider complaints pursuant to 39 USC. § 3662 are somewhat atypical cases before the Commission, inasmuch as they are not initiated by clearly delineated Postal Service requests or mail classification proposals generated by the Commission or other parties. As a result, the proper range and extent of procedures to be employed may not be evident at the outset of the case. As a general matter, however, it would appear appropriate to adopt procedures that are commensurate with the number and complexity of the issues presented, as well as the nature of the remedies proposed by the parties.

P.O. Ruling No. C96-1/1. Indeed, in a Docket No. C96-1 Order denying the complainant's motion for summary disposition, the Commission expressly limited the scope of discovery to information relevant to the legal question before the Commission:

[T]he Commission will not curtail the opportunities of the Postal Service or any other interested party to develop further relevant and material information for inclusion in the record of this proceeding. However, in light of the general agreement on the existence of a single central issue in this proceeding, that information will be appropriately limited to factual matters that bear directly on the "postal" or "non-postal" character of the Pack & Send service. Other information is not germane to the issue which the Commission will decide to resolve the Coalition's Complaint.

Order No. 1135 at 5. Similarly, here, the litigants are in an unusual posture. This proceeding was initiated by the filing of a terse complaint. This is to be contrasted with a typical rate and classification proceeding initiated by a request filed under §§ 3622 or 3623, which would be accompanied by a voluminous evidentiary presentation. Both the request and supporting materials serve to circumscribe the subject matter and scope of the proceeding. Here, by contrast, it is far from clear what the permissible scope of

discovery should be, let alone whether any discovery beyond that alluded to in Order No. 1239 is appropriate.

The Commission has not directly addressed in Order No. 1239 UPS's request, first presented in its Answer to the Postal Service's Motion to Dismiss, filed on December 16, 1998, and reiterated in its Answer in Response to Motion of the United States Postal Service for Reconsideration, filed March 9, 1999, and in its Motion for Leave to Conduct Discovery, filed March 17, that it be permitted to conduct discovery on the Postal Service. While it is evident that Order No. 1239 acknowledges UPS's Motion for Leave to Conduct Discovery, the Order does not explicitly rule on UPS's request to conduct discovery. The Order merely acknowledges that further proceedings will be held to enable the parties to "adduce additional facts through discovery and to make evidentiary presentations." Order No. 1239 at 22. In addition, while the Order states "discovery requests directed toward [information responsive to Question 4(a) of Order No. 1230] or related information" are not foreclosed, the procedural schedule, and special rules, if any, alluded to in the Order have not yet been issued. UPS's discovery request is therefore inappropriate until preliminary rulings defining the procedures and scope of permissible discovery are finalized.

#### IV. SPECIFIC OBJECTIONS

**Interrogatories UPS/USPS-2, 3 (in part), 4, 20(a), and 24.** Interrogatories 2 and 4 request that the Postal Service provide specific volume information on Post E.C.S. transactions. Interrogatory 2 asks for aggregate volumes, while interrogatory 4 asks for total volume figures (as opposed to proportions) showing the total number of

transactions from servers located in the United States or a foreign country.

Interrogatory 24 asks for aggregate revenues for Post E.C.S. transactions.

Interrogatory 3 requests information on the proportion of transactions initiated to or from the United States.

Interrogatories 2, 4, 20(a) and 24 are objectionable on grounds of commercial sensitivity and relevance. As the complainant's pleadings have made clear, the field of secure electronic services is competitive. In fact, UPS alleges in its complaint that "Post E.C.S. competes with a similar service provided by UPS." Complaint ¶¶ 16. Volume and revenue figures, as well as the number of licensed users, plainly do not inform the question of the legal status of Post E.C.S., but rather give competitors the opportunity to gain knowledge about the Postal Service's progress and strengths in the burgeoning secure electronic services market. As a test of a potential new service, the Postal Service submits that Post E.C.S. is particularly vulnerable to exposure of its information, the commercial importance of which may not become clear until the market is further defined. The Commission should not allow its complaint proceedings to become a tool by means of which competitors are permitted to tilt a competitive market in their favor.

Commission precedent is clear, moreover, that volume and revenue data are irrelevant in this context. In a similar proceeding concerning the legal status of Pack & Send service, the Presiding Officer sustained the Postal Service's objection to similar questions regarding volumes. The Presiding Officer explained:

Information regarding the volume of Pack & Send transactions is of little potential relevance in this inquiry. A determination that Pack & Send service is “postal” would not depend on establishing any particular number of transactions or any particular dispersion among facilities. This information could be significant in a § 3623 proceeding to consider recommendation of Pack & Send service as a mail classification but not in resolving the issue currently before the Commission.

P.O. Ruling No. C96-1/5 at 4. This conclusion applies with equal force here, where the legal status of Post E.C.S. is the only issue before the Commission. For the same reason, the number of licensed customers is irrelevant to the issues in this docket.

Interrogatories 3 and 4 are also objectionable to the extent that they request information about the foreign posts’ volumes, i.e., those Post E.C.S. transactions from the other post’s licensed users that originate on foreign servers. These include transactions from customers of LaPoste and Canada Post, not the United States Postal Service. The Postal Service receives no transaction revenue for these Post E.C.S. messages. Requests for information about such transactions are clearly objectionable on grounds of commercial sensitivity, relevance, and jurisdiction. The foreign posts’ transactions with their domestic customers have no bearing on the Commission’s resolution of the legal nature of the Postal Service’s product and are not within the scope of this proceeding. To the contrary, such information only gives UPS a better understanding of the markets in which LaPoste and Canada Post Corporation operate, and would signal whether these markets are ripe for UPS also to enter into competition. Such information, moreover, is clearly “privileged or confidential information provided by a person” that is subject to withholding in a FOIA context under exemption 4.

*Interrogatories UPS/USPS-B, 21-23.* Interrogatories UPS/USPS-21-23

request detailed information concerning the aggregate and specific costs of Post E.C.S. Interrogatory 8 asks a related question about the relationship of costs and revenues of Post E.C.S. These questions are objectionable on grounds of commercial sensitivity and relevance. Again, the only question before the Commission is the legal status of Post E.C.S. Forcing the Postal Service to release information of this nature to an acknowledged competitor, when the offering in question may not ever be determined to be suitable for Commission review, is inappropriate. Knowledge about the costs of the service, particularly in relation to revenues, gives UPS a better understanding of Post E.C.S.'s financial performance, thereby helping it gauge where and how to compete more effectively.

Furthermore, cost information is of no relevance here. Commission precedent clearly establishes that information about costs and cost coverage is not germane to the inquiry of whether a service is "postal" in character. The Presiding Officer ruled such information to be irrelevant in a similar proceeding examining the legal status of the Pack & Send product:

If the Commission were considering the recommendation of an appropriate fee for the Pack & Send service, formal studies and other underlying cost information would be highly relevant. However, with the current focus on the "postal" character of the service, information about cost levels and the recovery of costs in fees would not contribute to resolution of the issue before the Commission. The costs associated with providing a service have no bearing on the qualitative relationship of that service to the carriage of mail. Therefore, I shall not direct the Postal Service to respond to these requests.

Interrogatories UPS/USPS-V(b)-(c), **and** 7. Interrogatories 1 (b)-(c) and 7 request that the Postal Service identify and describe the functions of offices and employee positions within the Postal Service that are involved in developing, implementing, providing, and offering Post E.C.S. These invasive questions amount to little more than corporate intelligence gathering, and are not reasonably calculated towards building an evidentiary record for the question before the Commission. These questions attempt to unearth information about the decisionmaking process within the Postal Service for new product initiatives, Information about the decisionmaking process of the Postal Service with respect to the scores of decisions made in the process of implementing and testing a service offering would be an obvious benefit to any competitor, particularly one with such a clear interest in the particular offering being questioned, and would further undermine the efficacy of the decisionmaking process. Commission precedent makes clear, moreover, that such information is irrelevant. As the Presiding Officer in Docket No. C96-1 observed, “the decisional processes whereby the [Pack & Send] service was brought into being . . . have no bearing on the qualities of the services.” Rather, such information is of “very attenuated relevance, at best. . . .” P.O. Ruling No. C96-1/5 at 5. In short, the requested information is of no relevance to a determination as to Post E.C.S.’s legal status.

***Interrogatory UPS/USPS-5 (introductory subpart).*** The introductory subpart to interrogatory 5 requests all documents “referring or relating to Post E.C.S. . . . .” This interrogatory is objectionable on multiple grounds. First, the question is vague, overbroad, and unduly burdensome. Numerous postal employees have been involved



in this project in some capacity, and a search of their records for responsive documents would consume countless hours of search time of electronic and paper records, Second, the interrogatory would require the production of many documents that are covered by the attorney-client, work product, and deliberative process privileges. Third, the interrogatory contains no scope limitation, and therefore would require a search for, and production of, voluminous documents having no relevance whatsoever to the issues before the Commission. Finally, the interrogatory would require the production of draft and final documents that contain commercially sensitive or proprietary information or trade secrets of the Postal Service, the International Post Corporation (IPC), and the foreign posts, as well as their suppliers, contractors, and customers, all of which are beyond the scope of this proceeding.

***Interrogatories UPS/USPS-5(g) and 13.*** Interrogatory 13 requests memoranda, studies, reports, analyses, and recommendations on whether the Postal Service should provide Post E.C.S.<sup>2</sup> Interrogatory 5(g) asks a related question about plans for future provision of Post E.C.S. These interrogatories are objectionable on grounds of privilege, commercial sensitivity, and relevance.

The Postal Service has identified as potentially responsive to this request: attorney-client communications, legal analyses prepared by attorneys in anticipation of and in connection with litigation, memoranda to executives from attorneys and managers, a

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<sup>2</sup> The Postal Service takes no comfort in UPS's offer to permit the filing of a response to Interrogatory 13 under the protective conditions attached to its Motion for a Protective Order. As the Postal Service explains in its Response to that motion, UPS's proposed  
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preliminary business plan for Post E.C.S., an analysis performed by the International Post Corporation for the Postal Service and the other foreign posts, as well as drafts of some of these documents.

Attorney-client communications and attorney work product are clearly shielded from disclosure under the attorney-client privilege and the attorney work product doctrine. With respect to responsive documents communicated between and among nonlawyers, such communications are protected by the deliberative process privilege or the work product doctrine. The Postal Service's Post E.C.S. product is a test of a potential new service in a new, burgeoning, and often unpredictable market. Decisionmaking regarding Post E.C.S.'s future requires frequent analysis, opinion, deliberation, and formulation of recommendations that are unquestionably predecisional, particularly given the service's test status and the controversy generated by the instant litigation. Such communications are not only highly sensitive from a commercial perspective, but also are clearly within the realm of the deliberative process privilege. As Commission precedent makes clear, the deliberative process privilege "protects certain opinions and recommendations underlying governmental decisions—i.e., predecisional deliberations—from disclosure, thereby encouraging candor among those advising decisionmakers, with open discussion of legal and policy issues . . . , " P.O. Ruling No. R97-1/60. In accordance with court precedent, the Commission has recognized that the privilege extends to recommendations and analyses of outside

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protective conditions are inadequate.

consultants. P.O. Ruling No. R97-1/60 (citing *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1161-62 (D.C. Cir. 1987), cert. denied, 485 U.S. 977 (1988)). In sum, documents containing decisionmaking regarding whether the Postal Service should provide Post E.C.S. and the product's future are privileged and must be shielded from disclosure.

In addition, these interrogatories are objectionable on grounds of relevance and commercial sensitivity. Whether the service should be continued from a business perspective is irrelevant, for this does not elucidate the issue before the Commission. The Presiding Officer in a similar docket concluded that "the decisional processes whereby [the challenged] service was brought into being . . . [have] no direct bearing on the qualities of the service itself." P.O. Ruling No. C96-1/5. Disclosure of such information would, moreover, pose a risk of substantial competitive harm on the Postal Service, for it would signal to competitors the product's vulnerabilities and strengths. Furthermore, some of this information is intertwined with recommendations made to other providers of this service, and such information, apart from being irrelevant to this proceeding, constitutes the proprietary commercial information of other entities.

Interrogatories UPS/USPS-S(e). Subpart (e) of interrogatory 5 requests plans for future marketing of Post E.C.S.<sup>3</sup> While the Postal Service has not developed a full marketing plan for Post E.C.S., it has identified some marketing plans that were

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<sup>3</sup> UPS identifies this interrogatory as one that can be filed under its proposed protective conditions. Again, the Postal Service submits that the proposed offer is inadequate to protect the interests of the Postal Service and others.

previously prepared and that are in the process of being executed. This interrogatory is clearly objectionable on grounds of relevance and commercial sensitivity. These documents were developed in conjunction with other posts and IPC and contain information about foreign markets. Marketing plans do not meaningfully describe the quality and characteristics of Post E.C.S. This sort of information could be clearly exploited to the detriment to the Postal Service, notwithstanding the protective conditions UPS proposes, which, as explained in the Postal Service's Response to UPS's Motion for a Protective Order, are wholly inadequate. Armed with the Postal Service's marketing plans, "a witness or potential witness" employed or retained by UPS may be tempted to use such information to affect the potential success of the Postal Service's eventual business. The Commission should guard against the possibility that UPS is attempting to use the Commission's procedures to further its commercial interest in marketing plans,

**Interrogatories UP S/USP S- 5(b), (c), 6, and 72 (descriptions and instructions).** These interrogatories request instructions, training materials, marketing materials and motivational tools given to Postal Service employees and contractors. These interrogatories delve into the standard operating procedures of the Postal Service, and are objectionable on grounds of relevance, except to the extent that they contain product descriptions. These interrogatories are also objectionable on grounds of commercial sensitivity in the context of the subject matter of this proceeding. The Commission has recognized that standard operating procedures for competitive products are commercially sensitive and deserve protection from public disclosure.

P.O. Ruling No. MC97-5/6 concluded that “valuable, proprietary instructions provided by [CMRA] franchisors to their franchisees” are commercially sensitive. Relevant portions of instructions to postal employees on how to provide Post E.C.S. deserve no less protection. Motivational and marketing materials are commercially sensitive and irrelevant to the controversy at issue in this docket, except to the extent that they contain product descriptions.

***Interrogatories UPS/USPS-5(a) (in part), 5(d), 10 (solicitations, advertising) (in part) and 12.*** These interrogatories request the production of promotional materials, coupons, advertisements, solicitations, and marketing materials. Interrogatory 5(d) goes even further and requests all communications sent to customers or potential customers. The Postal Service objects to these interrogatories, in part or in their entirety, on grounds of relevance, commercial sensitivity, and undue burden.

The Postal Service is prepared to concede the relevance of promotional materials, advertising, solicitations, and marketing materials only to the extent that they contain descriptions of the attributes and workings of Post E.C.S. However, advertising and solicitations sent to specific customers, as well as internal marketing materials, are of significant commercial value. Disclosure of such items, which by definition are not widely available, would give competitors insight into how the Postal Service promotes the service through targeted advertising, and thereby enable competitors to evaluate the Postal Service’s marketing strategies for this product. To the extent relevant, such information should be provided only under strict protective conditions in Docket No.

R97-1/62, as modified by P.O. Ruling No. R97-1/93, and with the additional protections proposed in the Postal Service's Response to UPS's Motion for Protective Order,

With respect to mass media advertising, the Postal Service does not concede the relevance of such materials, except to the extent that descriptions of Post E.C.S. service are contained therein. The Postal Service therefore objects to the production of any mass media advertising, or portions thereof, that does not contain such information,

The Postal Service objects to the production of all other communications with customers. These include communications such as boilerplate communications to new customers, responses to complaints, boilerplate notices sent to customers concerning the extension of the test, and bills for usage. A complete search of Postal Service records for such documents would be unduly burdensome, particularly given their lack of relevance to the issues in this proceeding.

Interrogatories **UPS/USPS-10** (proposals and bids) and **11**. Interrogatories 10 and 11 request that the Postal Service provide proposals, bids, contracts, and agreements with customers for Post E.C.S. The Postal Service objects on grounds of relevance and commercial sensitivity. The Postal Service has already provided a copy of the standard terms and conditions governing customer participation in the test in the attachment to its response to Question 4 in Order No. 1230. The Postal Service has not identified any other responsive information, *i.e.*, proposals, bids, or other agreements with customers, except for a standard application form to participate in the test and a price list. The Postal Service objects to the extent this interrogatory requests price information on grounds of relevance and commercial sensitivity. In a similar

proceeding, Docket No. C96-1, the Presiding Officer concluded that information on Pack & Send price levels “has no direct bearing on the ‘postal’ quality of the service.” P.O. Ruling No. C96-1/5 at 3. Postal Service prices for Post E.C.S. are completely unrelated to customer’s usage, or the terms and conditions, of “postal” products, as that term is understood in its jurisdictional sense. Thus, in accordance with Commission precedent, price information contained in customer contracts is clearly of no relevance here.

Furthermore, the Postal Service’s practice has been to restrict access to prices so that only customers that are serious prospects for participating in the Post E.C.S. test are given price information. The Commission has accorded a high level of protection to prices of private retailers, see Docket No. MC97-5, Tr. 611520. Thus, even assuming, for purposes of argument, any relevance of prices, the Postal Service’s prices for this new product offering should be accorded comparable protection.

***Interrogatory UPS/USPS-5(f)***. Subpart (f) of interrogatory 5 asks for surveys of customers regarding Post E.C.S.<sup>4</sup> The Postal Service has identified written summaries of telephone and email communications from its customers describing their experience with the product,<sup>5</sup> as well as researchers’ and consultants’ reports and analyses of

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<sup>4</sup> UPS identifies this interrogatory as one that can be filed under its proposed protective conditions. Again, the Postal Service submits that the proposed offer is inadequate to protect the interests of the Postal Service and others.

<sup>5</sup> The Postal Service does not consider market research of other post’s customers to be responsive to this request. To the extent UPS intended the question to apply to foreign markets, the Postal Service objects to any discovery of such information on grounds of relevance and commercial sensitivity.

customer feedback, as responsive to this request. The surveys address topics such as customers' reaction to prices, customer usage history, and suggestions for service improvement. The consultants' and researchers' reports analyze these comments and provide recommendations.

This request is objectionable on the grounds that it seeks highly sensitive commercial information. Again, based upon the very competitive nature of the market involved, the Postal Service considers that releasing information regarding customer feedback would be detrimental to its business interests, and would be of significant benefit to its competitors. Release of the Postal Service's market research would not only reveal the specific areas of interest to the Postal Service in implementing its own service offering, but would provide, at no cost to its competitors, an analysis of the market in which those competitors operate. Moreover, to the extent the interrogatory requests production of researchers' analysis of customer comments, Commission precedent establishes that such information is outside the bounds of permissible discovery. See P.O. Ruling No. R97-1/52 (permitting redaction, even under protective conditions, of "researchers' comments and conclusions on, and analysis and/or interpretation of, the underlying factual data").

The interrogatory is also objectionable on grounds of relevance. Customer comments on the service have nothing to do with the question before the Commission whether Post E.C.S. is a postal service under the standards put forth in prior legal precedent.



Finally, to the extent the interrogatory requests information about foreign markets, it is objectionable on separate grounds of relevance and commercial sensitivity.

**Interrogatories** UPS/USPS-75, **16**, and **17**. Interrogatories 15-17 generally request that the Postal Service provide “all data” concerning Post E.C.S. customers’ substitution of hardcopy mail services. These interrogatories are objectionable on grounds of commercial sensitivity and relevance, notwithstanding UPS’s invitation to redact customer identity. Although the Postal Service has no quantitative data responsive to this request, the Postal Service has identified written customer feedback described above, as well as reports of the usage of two customers, as potentially responsive to this request. The Postal Service emphasizes that complainant admits to competing with the Postal Service, and would obviously have a keen marketing interest in specific customer usage patterns. Such information is commercially sensitive and must be withheld from disclosure.

The Postal Service further objects on grounds of relevance. The Postal Service submits that evidence of substitutability does not inform the question of whether Post E.C.S. is a “postal” service in a jurisdictional sense. Taken to its logical extreme, this approach would classify alternatives such as newspapers, telephones, facsimile transmissions, and email communications, as “postal” services on the theory that consumers use such services in lieu of hardcopy mail services. Evidence of substitutability does not inform the inquiry presently before the Commission. Rather, such information, if relevant at all, is germane to a rate proposal’s consistency with §3622(b)(5), which is clearly not the issue before the Commission in this docket.

Interrogatory **UPS/USPS-14**. This interrogatory requests that the Postal Service provide "all contracts or agreements concerning PostECS, including all agreements between or among the Postal Service, La Poste, Canada Post Corporation, and International Post Corporation."<sup>6</sup> The Postal Service has identified a software development and license agreement executed by International Post Corporation (IPC), Tumbleweed Software, Canada Post, the Postal Service, and LaPoste; exhibits and addenda to that instrument, as well as a number of minor agreements between the Postal Service and suppliers for support services' related to Post E.C.S., as potentially responsive to this request.<sup>8</sup> The Postal Service objects to this interrogatory on grounds of relevance, privilege, and commercial sensitivity. As the Postal Service explained in its Motion for Reconsideration of Order No. 1230, the contents of documents identified

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<sup>6</sup> UPS identifies this interrogatory as one that can be filed under its proposed protective conditions. Again, the Postal Service submits that the proposed offer is inadequate to protect the interests of the Postal Service and others.

<sup>7</sup> These include agreements for services such as technical sales support, administrative support, help desk services, and consulting services. These have nothing to do with the issues before the Commission. Disclosure would only reveal more information about the Postal Service's costs, which as established above, are not germane to the issues before the Commission.

<sup>8</sup> The Postal Service does not consider any licensing agreements that may exist between the Postal Service and foreign posts regarding the use of the Postal Service's proprietary Electronic Postmark™ system software as responsive to this request, because Post E.C.S. service, as developed by the International Post Corporation, can be provided independently of the Electronic Postmark™ system. Any such agreements would be intended to confer the right to use the Postal Service's proprietary Electronic Postmark™ system software to other providers in their provision of secure electronic services. The services of other providers, such as the Canada Post and LaPoste, are not at issue here. Thus, Electronic Postmark™ software licensing agreements extended to foreign posts are well beyond the scope of this proceeding. Furthermore, the Postal Service regards any such agreements as highly confidential, and disclosure would

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by the Postal Service as potentially responsive to question 14 include highly sensitive commercial information that is not germane to the controversy before the Commission. These instruments contain commercial software license provisions, including: definitions, development of custom software, license, fees and payment, software provider support and maintenance, warranty, indemnity, term, termination, severability, notice, amendment, and communication procedures among the parties. Addenda and exhibits contain similar types of provisions, as well as proprietary computer code, descriptions of proprietary computer codes, functional requirements of software, a software test plan, and proprietary software integration plans. The parties to these instruments have further agreed to not disclose confidential information contained in, or generated in connection with performance under, these instruments. The above description of the terms and conditions of the instruments resolves any doubt as to their irrelevance in the context of this proceeding, and clearly indicates their commercially sensitive nature.

The documents should be withheld from disclosure under all circumstances because they contain highly sensitive commercial information. As the Postal Service's Post E.C.S. product is in a test status, further negotiation governing software licensing will be necessary. The negotiating position of the Postal Service and the other parties to these instruments would be seriously "compromised by outright disclosure." Cf. P.O. Ruling No. R97-1/40. This concern is particularly germane here, where the Postal

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(. . continued)  
 compromise negotiating positions.

Service has embarked on a new venture with a software supplier, IPC, and foreign postal administrations. The project is still in test phase, and the negotiating positions of the parties could change dramatically as customer demand for products like Post E.C.S. service matures.

In addition, disclosure of the documents under any circumstances could result in substantial commercial harm to the Postal Service, the software supplier, IPC, and the foreign posts. UPS alleges in its complaint that "Post E.C.S. competes with a similar service provided by UPS." Complaint ¶ 16. Indeed, UPS not only offers a competing product under the trade name UPS. Document Exchange Service<sup>SM, 9</sup>, but its product integrates the software of the very same *software supplier*." Disclosure of the terms and conditions of this agreement would be of enormous benefit to UPS. It would enhance UPS's bargaining position with the software supplier, reveal information indicating the costs and profitability of Post E.C.S. service, and forever impair the Postal Service's ability to enter into strategic business initiatives with IPC and the foreign posts.

Finally, the documents contain proprietary code, software integration plans, interface specification, and the financial and proprietary information of the Postal Service, the foreign posts, and IPC, all of which are confidential information and should not be disclosed under any circumstances.

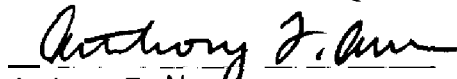
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<sup>9</sup> See <<http://www.exchange.ups.com> (visited May 25, 1999).

UNITED STATES POSTAL SERVICE


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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.

  
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May 25, 1999

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(...continued)

<sup>10</sup> See <[www.tumbleweed.com/partners/home.htm](http://www.tumbleweed.com/partners/home.htm)> (visited May 23, 1999).